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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ANNE B. ZIPES, *et al.*,
Petitioners,
v.
TRANS WORLD AIRLINES, INC.,
Respondent.

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,
v.
TRANS WORLD AIRLINES, INC., and ANNE B. ZIPES, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT TRANS WORLD AIRLINES, INC.

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Counsel for all parties have consented to the filing of this brief. Accordingly, the Motion to Submit Brief as Amicus Curiae no longer need be acted upon.

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council ("EEAC") moves this Court for leave to file the accompanying brief as Amicus Curiae supporting the respondent, Trans World Airlines, Inc., in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* As a significant part of its activities, EEAC has participated as amicus curiae in many Title VII cases before this Court. In some instances, EEAC sought and was granted permission by this Court to file such briefs. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978); and *Shell Oil Company v. Anne M. Dartt*, 434 U.S. 98 (1977). Otherwise, however, EEAC has filed such briefs with the consent of the parties. *See, e.g., Delta*

Air Lines, Inc. v. August, 101 S. Ct. 1146 (1981); *California Brewers Association v. Bryant*, 444 U.S. 598 (1980); and *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

3. The movant, EEAC, and its members, have broad experience and knowledge concerning the practical and legal application of the issues in this case. Those issues involve construing the timely charge filing requirements of Title VII and determining whether the parties may enter into a settlement which, in effect, supersedes their dispute over whether the plaintiffs' charges were filed in a timely manner. Because of its interest in Title VII timeliness and settlement issues, EEAC has participated as amicus curiae in other cases involving these subject areas. *See, e.g., Carson v. American Brands, Inc.*, 101 S. Ct. 993 (1981); *Delaware State College v. Ricks*, 101 S. Ct. 498 (1980); *Mohasco v. Silver*, 447 U.S. 807 (1980); and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977).

4. The written consent of counsel for the respondent, Trans World Airlines, Inc., has been filed with the Clerk of the Court. Counsel for the petitioner Union has given consent conditioned upon a stipulation by the respondent employer that it will likewise consent to the filing of amicus briefs that may be submitted in support of petitioner's position. TWA's letter to that effect has been filed with the Clerk of the Court. Finally, counsel for the petitioners-respondents, Anne B. Zipes, *et al.*, has given consent to the filing of this brief on behalf of Subclass A only, thereby necessitating this Motion. A letter to that effect also has been filed with the Clerk of the Court.

WHEREFORE, it is respectfully moved that EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT TRANS WORLD AIRLINES, INC.

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the position of the respondent, Trans

World Airlines, Inc., contingent upon the Court's granting of the accompanying motion, pursuant to Rule 42(3) of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

A discussion of EEAC's longstanding involvement in presenting to the Court the views of the employer community on significant equal employment opportunity issues is detailed in the accompanying motion. (*Supra*, pp. vii-x). We emphasize here, however, the importance of this case to the future litigative posture of employers nationwide in Title VII suits. It is not uncommon for EEAC members and other employers, like the employer in this case, to waive the right to litigate issues and to enter into settlement agreements in order to save themselves (and consequently, other parties) the time, expense, and inevitable risk of litigation. Of particular concern to EEAC, therefore, is the question of whether the Seventh Circuit's holding that the claims of some class members were untimely prevents the parties from resolving their continuing dispute over that issue by entering into a settlement that will end this lengthy litigation. EEAC believes that a challenge to the settlement on the basis of a disputed issue of timeliness not only is legally deficient, but, if successful, would have a debilitating effect on the settlement process as a fair, efficient and congressionally-preferred device for resolving employment discrimination claims.

STATEMENT OF THE CASE

In 1970, a Title VII class action was brought in this and another case by the airline hostesses' union challenging the employer's policy of terminating fe-

male flight attendants who became pregnant. I J.A. 4a.[1] The policy was subsequently eliminated and a settlement was reached which provided reemployment rights without back pay or retroactive seniority. I J.A. 21a. On a consolidated appeal by several objecting nonincumbent class members, the Seventh Circuit reversed court approval of the settlement and remanded the case to the district court with instructions to eject the union as class representative. *Air Line Stew. & S. Ass'n, Local 550 v. American Airlines*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

In subsequent proceedings, the Seventh Circuit found that the challenged policy violated Title VII. The court of appeals also ruled, however, that the claims of approximately 92% of the members of the plaintiffs' class were time-barred because these class members had failed to file charges with the EEOC within 90 days after the alleged unlawful practice occurred.[2] *In re Consolidated Pretrial Proceedings in*

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[1] References to Volume I of the Joint Appendix of the parties are cited as "I J.A.," followed by the appropriate page number.

[2] Prior to the 1972 amendments to Title VII, the limitations period was 90 days. The applicable pre-1972 provision reads in its entirety as follows:

> (d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty

the Airline Cases, 582 F.2d 1142 (7th Cir. 1978). Both the new class representatives and the employer filed petitions in this Court for a writ of certiorari (Sup. Ct. Nos. 78-1545 and 78-1549). Thereafter, this Court granted the parties' joint motion to defer consideration of the petitions pending the completion of settlement proceedings in the district court. 442 U.S. 916 (1979).

The employer again agreed to settle the case, this time with the new class representatives. Under the settlement, each of two subclasses was to receive 1.5 million dollars, and all class members were to be offered reemployment with full company seniority. Subclass A was composed of those whose claims were concededly timely; Subclass B was composed of those whose claims the Seventh Circuit previously had found to be time-barred. The district court was given the power to determine the amount of competitive seniority to grant to each class member.

The Seventh Circuit approved the settlement over the objections of the union, which had argued that the settlement of time-barred claims was outside the jurisdiction of the court and would adversely affect the contractual seniority rights of incumbent employees. 630 F.2d 1164. The court of appeals held that voluntary compliance with Title VII is of paramount importance, and the parties should be allowed to settle a suit rather than await the uncertain out-

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days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. § 2000(d) (1970).

come of Supreme Court review. *Id.* at 1168. It noted that there was a split in the lower court decisions over whether timely filing with EEOC is a jurisdictional prerequisite for maintenance of a Title VII suit. *Id.* at 1168 n.2 (cases cited therein).

SUMMARY OF ARGUMENT

The essence of the IFFA's argument is that once a court has determined that a Title VII charge is untimely under the statute's charge filing requirements, the court, *ipso facto*, loses jurisdiction over that portion of the case and cannot entertain a settlement by the party litigants. This argument confuses the statutory obligation of the charging party to file a timely charge with the jurisdiction of the federal courts to oversee the resolution of Title VII suits either by trial or settlement. The opinion of the court of appeals properly construed the strict filing requirement which the statute imposes upon parties to file charges within the statutory time period, while, at the same time, recognized that a holding of lack of diligence on the part of the plaintiff does not thereby prevent the court from approving a settlement of such claims in order to end the case and forestall further litigation on that issue.

Section 703(f)(3) of Title VII confers jurisdiction upon the federal courts to hear actions brought under the statute. A separate section—706(e)—imposes a strict requirement upon charging parties to file a charge under the statute within a specific time limit. The court of appeals' decision in No. 80-951 properly distinguishes between the viability of pursuing claims based on charges that should be considered untimely filed, and the dynamics of the settlement process

which is an inherent part of court jurisdiction. A settlement, similar to a consent decree, "normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971).

As the party briefs before the Court demonstrate, the exclusion of the claims of part of the class membership remains in dispute, but the parties' assessment of this and other issues has led them to settle rather than to litigate. 630 F.2d at 1168. This circumstance should not be viewed as unusual. Challenges to the timeliness of the charge are raised often, and many times early in the proceedings. Court resolutions of such preliminary questions are not subject to interlocutory appeal (*Gardner v. Westinghouse Broadcasting Company*, 437 U.S. 478 (1978)) and they, among other issues, will play a large part in party decisions as to whether to settle or to continue to litigate the case. Approval of the settlement irrespective of the timeliness question, therefore, would simply be consistent with this Court's observation that when courts review settlements, "[t]hey do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 101 S. Ct. 993, 998-99 n.14 (1981).

The IFFA, however, would prevent the settlement of timeliness issues and force the parties to litigate such issues to some final forum, which, as this case demonstrates, could involve several runs up and down the appellate ladder. In view of Title VII's strong preference for voluntary compliance, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974), parties

to an employment discrimination suit should have broad discretion to settle a case, unencumbered by the need to resolve legal issues otherwise rendered moot.

If the Court deems appropriate the review of No. 78-1545, we submit that the court of appeals' decision excluding the prosecution of Subclass B claims should be affirmed. As a general matter, although this Court has used different labels to describe Title VII's charge filing requirements, it has consistently required they be complied with strictly. In defining Title VII's jurisdictional prerequisites "with precision," *Alexander v. Gardner-Denver Co.*, 415 U.S. at 47, this Court has observed that "Congress did not leave to courts the decision as to which delays might or might not be 'slight'." *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 240 (1976). On the basis of these and other decisions of this Court, see *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977), as well as upon its own examination of relevant legislative history, the court of appeals properly rejected arguments for equitable tolling made on behalf of Subclass B members, all of whom failed to file timely charges. In sum, the court correctly determined in No. 78-1545 that neither waiver nor estoppel theories would preserve the prosecution of such claims against the interjection of an untimeliness defense.

ARGUMENT

ALTHOUGH THE CLAIMS OF SUBCLASS B MEMBERS WERE UNTIMELY FILED, THE COURT OF APPEALS PROPERLY RULED THAT THE DISTRICT COURT HAD JURISDICTION TO APPROVE THE CLASS-WIDE SETTLEMENT

A. Approval of the Class-Wide Settlement is Appropriate Irrespective of the Merits of the Timeliness Issue

1. *Policy Considerations Favor Settlement*

Despite its complicated procedural history, the basic facts of this case are unextraordinary. EEOC charges were filed; a right to sue letter was issued by EEOC; a private Title VII suit was filed; the employer-defendant challenged the timeliness of the EEOC charge; the employer's position was adopted; the parties recognized that further appeal and litigation was possible, but determined, on balance, to settle the case. The settlement, however, is challenged on the basis that charges found to be untimely can never be settled because the court automatically loses jurisdiction over the suit.

There is nothing illegal or inconsistent, however, in requiring strict adherence to the statutory charge filing requirements and at the same time permitting the courts to approve settlements which, in part, terminate hotly disputed timeliness issues. The Seventh Circuit's judgment, in this regard, promotes Title VII's policy in favor of settlement and is consistent with the principle that when courts review settlements, "[t]hey do not decide the merits of the case or resolve unsettled legal questions." *Carson v. American Brands, Inc.*, 101 S. Ct. 993, 998-99 n.14 (1981).

The premium placed upon conciliation and settlement by the court of appeals' decision is consonant with Title VII's framework and is well-supported by the decisions of this Court. The "centerpiece" of Title VII is the prompt resolution of discrimination charges through conciliation. *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 359-60 (1977).[3]

As this Court has recognized, Title VII was framed to "screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in 'a voluntary and localized manner.'" *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979), *citing* 110 Cong. Rec. 12725 (June 4, 1967) (remarks of Sen. Humphrey).[4] Approval of this set-

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[3] In *EEOC v. Sherwood Medical Industries*, 452 F. Supp. 678, 683 (M.D. Fla. 1978), the court noted "the mandate that conciliation be attempted is unique to Title VII and it clearly reflects a strong congressional desire for out-of-court settlement of Title VII violations."

[4] The policy of the law to favor and uphold the amicable settlement of disputes has been applied by this Court in a variety of contexts. As the Court stated in *May v. LeClaire*, 78 U.S. (11 Wall.) 217, 228 (1870), when an agreement involving the settlement of unadjusted demands on both sides is made in the spirit of compromise, it should be upheld by courts of equity, and the rights of both parties under it should be protected as far as the facts and the settled principles of jurisprudence will permit. *Accord, Williams v. First National Bank*, 216 U.S. 582, 595 (1910). To be sure, such principles would not sanction a court-approved settlement accomplished by fraud, *Tilton v. Cofield*, 93 U.S. 163 (1876). In the absence of such an egregious factor, however, a "settlement ought not to be overthrown, *even if the court should now be of the opinion that the party complainant of it surrendered*

tlement obviously promotes Congress' decision that cooperation and voluntary compliance with the civil rights laws are "*the preferred* means for achieving [the elimination of unlawful employment discrimination]. . . ." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (emphasis in the original).[5]

Among the reasons for encouraging settlement are the need to alleviate crowded dockets, the costs of litigation, and the long wait for judicial determinations. *McArthur v. Southern Airways, Inc.*, 569 F.2d 276, 280 (5th Cir. 1978). In this eleven-year-old class action proceeding with industry-wide implications, these factors are particularly pertinent, and lend additional weight to the presumptive validity with which the settlement should be viewed. Thus,

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rights that the law, if appealed to, would have sustained." *Hennessy v. Bacon*, 137 U.S. 78, 85 (1890) (Harlan, J.) (emphasis added). *See also United States v. Swift & Co.*, 386 U.S. 106, 119 (1932).

[5] Beyond the clear, general policy in favor of encouraging settlements, *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960), the circuit courts have consistently identified civil rights cases as involving "an area where voluntary compliance by the parties over an extended period will contribute significantly toward ultimate achievement of statutory goals." *Patterson v. Newspaper & Mail Del. U. of N.Y. & Vic.*, 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied sub nom. Larkin v. Patterson*, 427 U.S. 911 (1976); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968) ("there is great emphasis in Title VII on private settlement and the elimination of unfair practices *without* litigation") (emphasis added); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1174 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976) ("it is the clearly expressed intent of that Act to encourage settlements").

in a case with procedural parallels to the case at bar, the Fifth Circuit considered the scope of the government's authority to encourage and negotiate the settlement of industry-wide employment discrimination charges in the nation's steel industry. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). In the face of challenges to a consent decree by intervenors, the court of appeals underscored the importance of the settlement as vitiating the need for industry-wide litigation. "[T]hrough what lens," asked the court, "do we judge the adequacy of the settlement as against the intervenors' objections, bearing in mind that Congress and the Supreme Court have expressed a preference for voluntary compliance above all other tools of enforcement?" *Id.* at 849. Summarizing the extensive case law favoring settlement over negotiation, the court concluded that the agreement was entitled to enforcement unless the district court abused its discretion or overlooked an illegal provision. *Id.* at 850. Indeed, the court of appeals even acknowledged that although the consent decree contained no judicial findings of unlawful employment discrimination, it also was governed by rules of law "substantially less rigorous than those which govern contested litigation." *Id.* at 881.[6]

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[6] *See also Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976) (Title VII, class action):

> "It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so many federal courts and which frequently present serious problems of management and expense."

Liberal principles toward settlement approval were applied again in *EEOC v. Safeway Stores*, 611 F.2d 795 (10th Cir. 1979). In evaluating the district court's administration of a Title VII consent decree, the Tenth Circuit emphasized the flexibility and broad discretion the district court properly enjoys. In approving the decree, the court of appeals cautioned that "to argue that the terms of a consent decree may not vary from the statutory limits of Title VII is to misconceive the nature of consent decrees and to ignore the strong policy embodied in Title VII in favor of voluntary settlements." *Id.* at 789.

In view of these strong policy considerations favoring settlement, the court of appeals properly deemed irrelevant its previous decision declaring part of the class untimely. Inherent in its decision was the practical realization that the dispute over the timeliness of certain class members raises merely one among a host of legal issues often contested early in a proceeding. Were the issue always to be forced to definitive resolution, countless settlements would be aborted. More fundamentally, no incentive would remain for a defendant ever to settle a claim prior to a final judgment on the merits, for there always would be the risk of the case "rising from the dead" simply because the issue of timeliness had once been raised. *Cf. Burkhalter v. Montgomery Ward & Co.*, 26 FEP Cases 524, 526-27 (E.D. Ark. 1981) (where parties entered into settlement, all issues were thereby mooted). *See also West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085-86 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) ("A Consent Decree would be worthless if it could be attacked on the ground that

had the Court made a particular determination such relief would then not be statutorily available").

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 45 (1974), this Court acknowledged that the federal courts enjoy "plenary power to secure compliance with Title VII." Empowered by the statute to grant all forms of equitable relief deemed appropriate, this Court noted in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778 n.39, 789-80 (1976), that [e]quitable remedies are a special blend of what is necessary, what is fair, and what is workable. . . . In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests. . . ." In view of a settlement between the parties that has undergone an evaluation by the district court to insure fairness, the judgment of the court of appeals approving its enforcement should not be disturbed.

2. *Article III Presents No Bar to Settlement*

Principles of justiciability inherent in Article III of the Constitution obviously apply to all federal cases, including this one. Accordingly, the court-approved settlement here under review presupposes the existence of federal jurisdiction over the subject matter of the case. Particularly in view of the policies favoring settlement over litigation, however, the judicial inquiry into subject matter jurisdiction sufficient to support court approval and enforcement of a settlement is directed primarily toward whether there exists the power to hear the type of case involved. *Cf. Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979). As this case plainly involves a federal statute which

vests jurisdiction in the federal courts, 42 U.S.C. § 2000e-5(f)(3)(1976), irrespective of the timely filing obligations placed upon charging parties by another section, approval of this settlement violates no rule of Article III justiciability.[7]

In *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 754 (1976), this Court observed that the meaning and scope of all concepts of justiciability "must be derived from the fundamental policies in forming the 'cases and controversies' limitations imposed by Article III." How these policies impact upon the requirement that a federal court have undisputed subject-matter jurisdiction over a case necessitates an inquiry into the purpose of the jurisdictional requirement. This case, of course, concerns exclusively federal court administration of a federal statute. Absent limitations on jurisdiction imposed by the Constitution for reasons of federalism, such as state rights or separation of powers,[8] this Court has re-

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[7] *See Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953) (Jones Act cases); *Montana-Dakota Util. Co. v. Northwestern Pub. S. Co.*, 341 U.S. 246 (1951) (Federal Power Act); *Securities and Exchange Comm. v. Thermodynamics, Inc.*, 319 F. Supp. 1380 (D. Colo. 1970) (Securities Act).

[8] It is precisely these limitations that apply to a case like *Fairfax Countywide Citizens v. Fairfax County*, 571 F.2d 1299 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978), and thus make that case irrelevant here. There the court of appeals concluded that the district court lacked jurisdiction to approve a settlement agreement which was nothing more than a private contract whose validity and interpretation were governed by state law. The court searched in vain for either diversity jurisdiction under 28 U.S.C. § 1332 or a "special statutory grant of jurisdiction empowering the district court

peatedly turned away challenges on jurisdictional grounds in favor of promoting other significant policies. *See, e.g., Ladner v. United States*, 358 U.S. 169 (1958) (availability of collateral attack on federal conviction not to be considered *sua sponte*); *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 129 n.1 (1953) (since standing not questioned Court will not rule on it); *Louisiana Power & Light v. Thibodaux*, 360 U.S. 25, 26 n.1 (1959) (question of appellate jurisdiction eliminated by a limited grant of certiorari). Accordingly, as federal jurisdiction clearly is present in this case, there is no reason to hold that the courts have no authority to permit the parties to enter into an enforceable settlement.

Moreover, there is a separate but relevant reason for approving the particular settlement in this case. Because at least some of the class members were timely, this case plainly is one that "belongs" in federal court. Not all class members must meet formal jurisdictional requirements in order to participate in a settlement. *See Patterson v. Stovall*, 529 F.2d 108 (7th Cir. 1976). In *Patterson*, the court of appeals

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in the instant case to take cognizance over the contract dispute." 571 F.2d at 1303 n.10.

Similarly, in *United States v. Boe*, 543 F.2d 151 (C.C.P.A. 1976), the court negated a voluntary settlement on an agreed statement of facts because court approval would have usurped the power of the Customs Service, an executive department. The court made clear that the attempt to exercise a patently non-existent jurisdiction would tend to chip away at the separation of powers. *Id.* at 158. No such issues arise in the instant case which unquestionably involves only issues within the undisputed jurisdiction of the federal courts.

reviewed a proposed class action settlement involving a suit by depositors to recover sums invested by defendants in cash commodities for deferred deliveries. Among the objections of certain depositors to the proposed settlement was that the trial court lacked jurisdiction. The court rejected the argument on numerous grounds, the most important of which for purposes here concerned the existence of diversity jurisdiction. The court observed that "although class members cannot aggregate their claims in a diversity case," *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), "*at least some of the claimants could have individually satisfied the $10,000 limitation.*" *Id.* at 112, n.5 (emphasis added). Thus, the court acknowledged that, like the case here, settlement of class claims is permissible so long as there exists uncontestable jurisdiction over at least some of the class members.[9]

In sum, where a cause of action is asserted under federal law, as in this case, a federal court has the power to try or to settle the case. In this limited sense, if the plaintiff "makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad." *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.). *Cf. Pittsburgh C. & St. L. Ry. v. Ramsey*, 89 U.S. (22 Wall.) 322 (1875) (parties

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[9] It was the total absence of timely plaintiffs in *McArthur v. Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978), that distinguishes that case from the one here at bar. As the Fifth Circuit stated, "[s]ince *no plaintiff* in this cause made a timely filing with the Equal Employment Opportunity Commission (EEOC), the district court should have dismissed this cause for lack of jurisdiction." *Id.* at 277.

can admit jurisdictional facts). Before ultimate determination of the validity of the federal claim—a determination that would include resolving the dispute over whether certain plaintiffs made timely filing—there is no statutory or constitutional barrier that prevents the parties from settling their dispute.

3. *Retroactive Seniority Provisions Are Not a Bar to Settlement*

The settlement here under review has been challenged on the ground that the district court lacked the power to approve a grant of retroactive seniority without Union acceptance. Even assuming that the issue is properly before the Court,[10] this argument is without merit. Because this settlement "serves the public policy of remedying past acts of sex discrimination," 630 F.2d at 1169, and has been evaluated by the court and found not to have an "unusual adverse impact" on current employees, *id.*, its terms cannot be limited by pre-existing private contractual

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[10] Issues concerning restoration of seniority to reinstated class members may not properly be before this Court for two reasons: (1) the Union's petition for a writ of certiorari in No. 80-951 included a question concerning the appropriateness of the remedy of rightful place competitive seniority. That aspect of the petition was dismissed as improvidently granted by this Court. 49 U.S.L.W. 3863 (U.S. May 19, 1981); (2) because the Court has limited the issues on review primarily to those raised by the district court's settlement order, issues concerning the district court's seniority order may well be irrelevant at this stage of the proceeding. See The Brief On The Merits Of The Plaintiff Class. *Cf.* Motion By Trans World Airlines, Inc., To Limit Review in No. 80-951 To Issue of Seniority And Treat Nos. 78-1545 and 78-1549 as Moot, filed April 15, 1981, at 4-11.

relationships. *See Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

It has long been the law that in preventing discriminatory practices and violations of federal law, district courts have discretion to issue orders affecting private agreements, including those under collective bargaining. *J. I. Case Company v. NLRB*, 321 U.S. 332 (1944); *Philadelphia, B. & W. R.R. Co. v. Schubert*, 224 U.S. 602 (1912). Citing *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), this Court noted in *Franks* that "enhancing the seniority status of certain employees for purposes of furthering public policy interests" is permissible, "even though this will to some extent be detrimental to the expectations acquired by other employees" under previous arrangements. 424 U.S. at 778-79.

Because of Title VII's emphasis on voluntary compliance, the presumptive validity of Title VII settlements [11] augments the burden objectors normally must overcome to defeat a settlement. As one district court approving a proposed consent decree under Title VII has stated:

> When objections to the settlement are presented, the burden must be on the objectant to convince the Court to disapprove the proposed settlement, and the trial court's reasoned approval of the settlement will be entitled to much deference. Otherwise, the policy of voluntary compliance with Title VII could be severely thwarted by the interposition of objections to the settlement.

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[11] *United States v. City of Alexandria*, 614 F.2d 1358, 1361 (5th Cir. 1980); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

United States v. City of Philadelphia, 499 F. Supp. 1196, 1199 (E.D. Pa. 1980) (citation omitted). Particularly where the district court has acted so scrupulously to hear and pass upon the objections of the intervenor Union, as it did in this case, 630 F.2d at 1169, the court cannot be said to have abused its discretion in approving a settlement that allowed for retroactive seniority. See *Moore v. City of San Jose*, 615 F.2d 1265 (9th Cir. 1980); *cf. Protective Committee v. Anderson*, 390 U.S. 414 (1968).

B. Although Unnecessary to the Resolution of this Case, the Court of Appeals Nevertheless Ruled Properly that the Prosecution of Subclass B Member Claims Should be Barred as Untimely

The judgment under review in No. 78-1545 raises the question whether the court of appeals properly held the Subclass B member claims untimely filed, and thus barred from further prosecution. Consistent with the principles of law previously explicated in this brief, we submit that a resolution of this issue is unnecessary and, accordingly, that this Court should dismiss the appeal as moot in light of the settlement. If the Court deems it appropriate to reach the merits of the judgment in No. 78-1545, however, we urge the Court to reaffirm its strict reading of the time filing requirement under Title VII and affirm the judgment below.

Title VII of the Civil Rights Act of 1964 unequivocally states that employment discrimination charges "shall be filed" within a relevant time period, which in this case was 90 days. 42 U.S.C. § 2000(d) (1970). Congress' use of the imperative establishes a strict requirement. Absent a continuing violation sufficient to negate a late filing defense, Subclass B

Members should be barred from prosecuting their claims.[12]

Having determined that the 90-day time limitation was not met, the court of appeals readily concluded that the claims of Subclass B members failed to satisfy what this Court has repeatedly termed a jurisdictional prerequisite to suit under Title VII. 582 F.2d

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[12] Although all members of Subclass B were terminated more than 90 days before the plaintiff class filed its charge with EEOC, See I J.A. 112, the district court concluded that their claims were timely because of the continuation of the subject employment policy. Concerned that the broad application of the "continuing violation" theory would vitiate Title VII's filing requirement, however, the court of appeals reversed the district court's ruling, and held that the time limits were to be measured from the time of the relevant, discrete employment decisions. 582 F.2d at 1149.

Subsequent interpretation of the effect of Title VII's time limits has strengthened the court of appeals' strict approach to the doctrine of continuing violation. As this Court stated in *Delaware State College v. Ricks*, 101 S. Ct. 498 (1980), determining the timeliness of an EEOC complaint requires a court "to identify precisely the 'unlawful employment practice' of which he complains." *Id.* at 503. In *Ricks* this Court concluded that the Title VII filing deadline must be measured from the day the employee is informed of his employer's decision to terminate his employment, and not from his last day of employment. *Id.* at 504. This Court reiterated its declaration in *United Air Lines, Inc. v. Evans*, 431 U.S. at 558, that mere continuity of employment is insufficient to prolong the life of an employment discrimination complaint. 101 S. Ct. at 504. Accordingly, the Seventh Circuit's declaration that "[p]ermanent severance of the employment relationship destroys the ties through which the direct impact of discrimination may be transmitted," 582 F.2d at 1149, has proved, particularly in retrospect, to be a sound exposition of the limitations of the continuing violation theory.

at 1151, *citing United Air Lines, Inc. v. Evans*, 431 U.S. at 555 n.4 ("Timely filing a prerequisite to the maintenance of a Title VII action"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (timely filing a "jurisdictional prerequisite"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973) (filing a timely charge jurisdictional prerequisite to federal action). Again, we submit, the strict reading of Title VII's timely filing limitation by the court of appeals was correct. For as this Court stated in *Electrical Workers v. Robbins & Meyers, Inc.*, 429 U.S. 229, 240 (1976):

> Congress has already spoken with respect to what it considers acceptable delay when it established a 90-day limitations period, and gave no indication that it considered a 'slight' delay followed by 90 days equally acceptable. In defining Title VII's jurisdictional prerequisite 'with precision,' *Alexander v. Gardner-Denver Co.*, 415 U.S. at 47, . . . Congress did not leave to courts the decision as to which delays might or might not be 'slight.'

This Court has had occasion to address the validity of equitable defenses to Title VII's time limitation requirements. On those occasions, it has consistently rejected their use and reaffirmed the strict application of the time limits. In *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), for example, the Court considered whether the comparable 180-day period would be tolled because plaintiff was pursuing a grievance procedure established under a collective bargaining agreement. Although this Court occasionally referred to the filing require-

ment as a "limitations period," it considered and rejected no less than five variations on the tolling argument.

This Court recently underscored its strong position against tolling of the filing requirement in *Delaware State College v. Ricks*, 101 S. Ct. 498 (1980). Noting that the filing requirement not only guarantees the protection of the civil rights laws to those who promptly assert their rights, but "also protects employers from the burden of defending claims from employment decisions that are long past," this Court rejected equitable tolling. 101 S. Ct. at 505. "It should not be forgotten," said this Court, "that time-limitations themselves promoted important interests." *Id., citing Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 ("the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones"), and *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980).[13]

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[13] In accordance with the circuit court's decision below, other federal courts have acknowledged that the time requirements set by Congress are designed to safeguard defendants, as well as agencies and courts, from stale claims. See *Gautam v. First National City Bank*, 425 F. Supp. 579, 585 (S.D.N.Y. 1976), *aff'd mem.*, 575 F.2d 1290 (2d Cir. 1977); *see also Loos v. Gerarge*, 374 F. Supp. 1338, 1340 (D. Hawaii 1974) (isolated and completed acts against a particular subjective viewpoint of the aggrieved "do not give the Plaintiff a perpetual right to file charges before the EEOC"); *Hickman v. Queen*, 15 FEP Cases 953, 955 (S.D. Ohio 1976).

These cases demonstrate that however Title VII's time limits are characterized, the availability of equitable defenses as a shield against their operation is highly circumscribed. Indeed, the *strictness* of the Title VII filing requirement, as intended by Congress and reaffirmed by this Court, is far more important as an operative principle than the formal label attached to the time requirements. For even in cases where a court has ruled that the filing requirements are not jurisdictional but susceptible to equitable tolling, the time limits have been construed strictly. "We have cautioned," said the Sixth Circuit, "that the concept [of equitable tolling] is not an escape valve through which jurisdictional requirements will evaporate since '[t]he tolling of the statutory periods on equitable grounds is usually very much restricted'." *Brown v. Mead Corp.*, 25 FEP Cases 684, 685 (6th Cir. 1981), *citing Geromette v. General Motors Corp.*, 609 F.2d 1200, 1203 (6th Cir. 1979), *cert. denied*, 446 U.S. 985 (1980).

Similarly, in *Carlile v. South Routt School Dist.*, 26 FEP Cases 281 (10th Cir. 1981), the Tenth Circuit reaffirmed its previously established rule that in order to toll Title VII's strict time limitation on filing a notice of intent to sue, only "active deception" would suffice. *Id.* at 284, *citing Cottrell v. Newspaper Agency Corporation*, 590 F.2d 836 (10th Cir. 1979). The Tenth Circuit opinion drew upon comparable language of the Second Circuit in *Smith v. American President Lines, Ltd.*, 571 F.2d 102, 109 (2d Cir. 1978):

> [T]he decision in *Electrical Workers* strongly suggests that, even assuming the Title VII time limits are not strictly jurisdictional, the tolling

> of those limits may be very restricted. The [Supreme] Court implied that tolling might be appropriate only where the defendant has actively misled the plaintiff respecting the cause of action, or where the plaintiff has in some extraordinary way been prevented from asserting his rights, or has raised the precise statutory claim in issue but has mistakenly done so in the wrong forum.

Casting aside questions of form, therefore, and concentrating upon the *substance* of the time limits and their importance to Title VII's statutory scheme, it is plain that the requirements are strict and are designed to be enforced in all but the most egregious circumstances. On the record now before this Court, it cannot be said such circumstances exist.

Viewed in the proper context, there are no policy reasons to permit the IFFA to gain the benefit of the "jurisdictional prerequisite" construction of Title VII's filing requirements. Arguments favoring strict adherence to the filing requirement are based upon policy concerns that defendants not be unfairly surprised or subject to delayed claims that become more difficult to defend over the course of time when witnesses may no longer be available and documentary evidence is more difficult to obtain. Quite simply, the decision whether or not to invoke such a defense is within the province of the party for whom the filing requirement was designed to protect. If the IFFA's right to object to the merits of the settlement were not fully protected before the district court, that would be another matter. But it would not be consonant with the voluntary resolution underpinnings of Title VII to set aside an otherwise valid settlement

merely because one of the issues disposed of by the parties related to an open legal question of the timeliness of the plaintiffs' EEOC charges.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals in No. 80-951 be affirmed and the appeal in No. 78-1545 be dismissed as moot in light of the settlement. If the Court deems it appropriate to reach the merits in No. 78-1545, the judgment there under review also should be affirmed.

Respectfully submitted,

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